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No. 94-1511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SAMUEL LEWIS, et al.,

Petitioners,

v.

FLETCHER CASEY, JR.,et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICUS CURIAE PRISON LEGAL SERVICES OF MICHIGAN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Prison Legal Services of Michigan (PLSM) is a private non-profit corporation with an office at the State Prison of Southern Michigan staffed by a supervising attorney and prisoner paralegals. It has been funded by the Michigan Department of Corrections since 1978 for the purpose of assisting prisoners in obtaining access to the courts. PLSM is familiar with the tasks prisoners must perform to seek various judicial remedies and with the difficulties they face in doing so. PLSM has appeared as amicus in litigation

regarding the assistance Michigan corrections officials must give prisoners who are unable to use law libraries or are prohibited from doing so. See Knop v Johnson and Hadix v Johnson, 977 F.2d 996 (6th Cir. 1992).

SUMMARY OF ARGUMENT

It is undisputed that prisoners who are illiterate, non-English speaking or confined to segregation units cannot use law libraries to obtain meaningful access to the courts. Such access is uniquely critical to prisoners whose only means of challenging either the fact of or the conditions of their confinement lies with

the courts. The suggestion that prisoners need only tell a simple story that can be written down by any literate fellow prisoner is badly misleading. State court postconviction procedures are often complex and may involve rigid deadlines. Federal district courts are well situated to assess the combined impact of state pleading requirements and state prison regulations on the ability of prisoners to seek judicial relief. Where access is effectively being denied, they should retain the flexibility to fashion realistic remedies. Special deference to prison administrators is not warranted where the decisions to be made

are matters of judicial expertise. Judges are responsible for protecting the prisoner's right to get to the courthouse door. Defining how and to what extent that right should be implemented is a function that should not be delegated to prison administrators.

ARGUMENT

WHERE COMPLEX CHARACTERISTICS OF BOTH STATE PRISON AND STATE COURT SYSTEMS INTERACT TO DENY ILLITERATE, NON-ENGLISH SPEAKING AND SEGREGATED PRISONERS MEANINGFUL ACCESS TO THE COURTS, FEDERAL JUDGES MUST RETAIN THE ABILITY TO FASHION REASONABLE AND REALISTIC REMEDIES.

Corrections administrators concede that law libraries are useless to prisoners who can barely read and write English, as well as

to prisoners who are denied physical access to them, but, they say, it is not a problem they need to address. Without actually knowing how great the need is, how many competent jailhouse lawyers there are, or even what "adequate" legal assistance is, they assume that illiterate and non-English speaking prisoners can get adequate legal assistance from other prisoners. They claim that a prisoner need only "tell a story" and a kindly judge will clarify the issues and appoint counsel if there is a hint of merit. They repeat like a mantra the observation made by this Court in Turner v Safley, 482 U.S. 78 (1986), that running prisons is a difficult business and that courts should

show appropriate deference to the judgment of prison administrators.

Prisoners stress that the "meaningful" access required by Bounds v Smith, 430 U.S. 817 (1977) must include the ability to meet the actual threshold requirements of the courts that review civil rights claims and petitions for postconviction relief. Having to function in a world where all the minutiae of daily life are regulated, they struggle to make outsiders understand that the inability to complete even simple tasks in a timely manner may cost them the opportunity for judicial review. Meeting deadlines is hard when getting photocopies or postage disbursements can take days, telephone calls

must be collect, and fax machines are out of the question. Researching a legal issue is difficult if one can only spend a few hours a night in the library or request a few books at a time from the shelves. Drafting intelligible pleadings is hopeless if one reads English at the fifth grade level. Even utilizing assistance from other prisoners may be impossible if one does not speak English at all.

To the prisoner, access to the courts is not a luxury. Since incarceration is a direct result of court action, and changes in the length or conditions of incarceration can also come about only through court action, access to the courts is a basic need in the

prison environment. Indeed, it is the only means prisoners have to protect themselves against the consequences of mistakes, negligence or deliberately harmful action by state officials. The needs of prisoners can not be compared to those of free people who are illiterate or non-English speaking since such people, by definition, have no need to challenge the fact, length or conditions of incarceration.

It is true that corrections officials do not create illiteracy, but prisons attempt to correct or cope with such conditions all the time. They provide education to the illiterate, treatment to the mentally ill, and medical care for preexisting injury and

disease. With some prison budgets swollen beyond the billion dollar mark, the relative cost of training and supervising prisoner legal assistants is minuscule. Implementing such programming is no more difficult than running prison industries or vocational training classes.

In determining whether prisoners are being afforded meaningful access, three questions are relevant:

1. What tasks must a prisoner perform to obtain access?

2. How capable are prisoners of performing those tasks?

3. Who is responsible for insuring that all prisoners receive the assistance necessary to obtain meaningful access?

Answering these questions requires concrete information about state court procedural requirements and about the resources available to state prisoners. Amicus hopes that this description of what access means in Michigan will provide a useful example.

A. MICHIGAN POSTCONVICTION PROCEDURE

1. Establishing A Realistic Context

Federal courts naturally view access in terms of the pro se pleadings they commonly see -- habeas corpus petitions and civil rights actions under 42 U.S.C. § 1983. They are familiar with the forms the district courts distribute for initiating such cases. They know that a sufficiently clear recita-

tion of facts indicating a civil rights violation may, standing alone, persuade a court to provide counsel in a § 1983 case, especially since substantial attorney fees may be awarded to prevailing plaintiffs. State officials reinforce this view. They emphasize that a right to appointed counsel exists for the direct appeal from the prisoner's conviction and assert that the court access sought "is largely for the purpose of filing federal habeas corpus petitions and civil rights actions." Petitioner's Brief at page 20, fn. 9.

This image of the pleadings to be filed minimizes the need for assistance by underestimating the complexity of the work

involved. For instance, Petitioner's Brief asserts at page 26:

> "Under the 'notice pleading' system, courts apply the law liberally, regardless of whether inmates have cited appropriate legal authorities, presented legal analyses, or correctly identified their claims. Inmates primarily need to present the facts underlying their claims, for which they can rely on their personal knowledge. The facts do not even need to be presented completely or precisely, as courts liberally grant leave to amend or appoint counsel when presented with ambiguous factual allegations that suggest a meritorious claim." (fn. Omitted)

The only problem with this utopian view is that it has little to do with the reality prisoners face, especially in pursuing postconviction relief. Beyond the admitted fact that even simplified forms are useless

to a person who cannot sound out the words on the page, there are many other hurdles to be surmounted in the state courts before a federal habeas petition becomes a relevant option.

Most obvious is the exhaustion requirement. Any state procedures that may be available for resolving a federal constitutional claim must be utilized, regardless of whether the prisoner has a right to counsel in connection with those procedures. Rose v Lundy, 455 U.S. 509 (1982). Less obvious are the barriers that may prevent prisoners from having all their federal claims raised when they should be -- on the direct appeal from the conviction.

These include improper decisions to deny the appointment of counsel in particular cases; limitations on the right to counsel in whole classes of cases; representation by lawyers who are inexperienced, overworked, or outright incompetent; highly detailed pleading requirements, and increasingly restrictive appellate court rules designed to control and expedite appellate court dockets. The Michigan system for postconviction review illustrates these difficulties.

2. The Appeal of Right

Until recently, every Michigan defendant convicted of a felony was entitled to an appeal of right. To preserve this right,

indigent defendants must request counsel within 42 days of sentencing. A trial court order granting a timely counsel request doubles as a claim of appeal and is sent directly to the Court of Appeals, which opens a file and tracks the progress of the case. MCR 6.425(F).

Counsel requests made after 42 days, but within the 18-month period for seeking appeal by leave, were to be "liberally granted". MCR 6.425(F)(1)(b). However, orders appointing counsel in such cases are not sent to the Court of Appeals and tracked on that Court's computer system. Neglect by an appointed attorney to file a leave application does not become visible like the

failure to file a timely brief in a claim case does.

Given that 58 Michigan trial courts appoint appellate counsel in an average of nearly 5,700 cases annually, even this liberal assignment system left a lot of room for human error. Some defendants lose request forms, fail to complete them properly, return them late, or depend unsuccessfully on others to mail them. Some court clerks misfile requests that go undiscovered for months or years. Some circuits attempt to save the cost of assigned counsel by ignoring the "liberally grant" standard for late requests, thereby requiring pro se prisoners to litigate their right to

have counsel appointed[1]. Other defendants are denied counsel on the ground that they are not indigent. Thus, even the process of obtaining counsel where the right exists can require prisoners to complete forms correctly, correspond with courts, and file full-blown applications for leave to appeal.

When attorneys fail to file timely briefs on behalf of indigent clients in appeals of right, the Court of Appeals sends warning notices, imposes fines and, if warranted, directs the appointment of substitute counsel. MCR 7.217. In leave

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[1] See People v Cottrell, 201 Mich App 256; 506 N.W.2d 12 (1993) (noting that issue had arisen repeatedly and finding abuse of discretion in denying counsel solely for lateness of request).

cases, where there is no tracking system, the opportunity for direct appeal can be lost altogether if an application is not filed within the deadline. MCR 7.205(F)(3). Thus, a prisoner who has had counsel appointed in response to a late request, but has not heard from the lawyer promptly, must attempt to insure that his or her case is not being neglected and to obtain the appointment of substitute counsel, if necessary.

Three major changes made within the last year have made the Michigan system far less liberal. In November, 1994, voters approved a ballot proposal that requires appeals in all guilty plea cases to proceed by leave, rather than by right. Thus, regardless of

when counsel was requested, plea appeals will not be tracked on the Court of Appeals computer unless and until an application for leave is filed. Two-thirds of all assigned appeals arise from plea-based convictions. Whereas previously about ten percent of all assigned appeals were leave cases because of late counsel requests, now over 3,000 indigent defendants a year (the vast majority of them prisoners) will be left without Court of Appeals oversight to make sure that their appeals are not being neglected.

The second change is a court rule amendment that will substantially increase the chance that appeals by leave, plea-based or otherwise, will in fact be neglected.

Effective November 1, 1995, the deadline for filing leave applications will be reduced from 18 months to 12 months. Admin. Order 1993-46, entered 3/3/95. This includes all the time needed for transcript preparation, research and the litigation of any issues that must be raised first in the trial court. Given the double whammy of shorter due dates and no back-up tracking system, more appointed attorneys will inevitably miss deadlines, leaving their clients to try to pick up the pieces.

The third change will result in some indigent prisoners not having counsel for a direct appeal at all. Since passage of the ballot proposal regarding plea appeals,

debate has arisen as to whether these cases are now discretionary appeals that do not require the appointment of counsel under this Court's holding in Ross v Moffitt, 417 U.S. 600 (1974). The Michigan Supreme Court has taken two steps toward resolving this debate. It has invited the Legislature to take a position on the matter, pending the Court's own ultimate decision. And it has amended the court rule [MCR 6.425(F)(1)(c)] on an interim basis to require that requests for appointed counsel in plea cases be "liberally granted" if made within 42 days of sentencing. There is no requirement that late requests be granted at all. Admin.

Order 1994-55, entered 12/30/94; effect continued 6/19/95.

In the short run, guilty-pleading prisoners will have to pursue their initial appeals without legal assistance if they fail, for whatever reason, to request counsel on time. Even if they do make timely requests, these prisoners may have to litigate their right to have those requests "liberally granted". And, depending on the resolution of the ultimate question, thousands of prisoners each year may be told that if they wish to appeal from plea-based convictions and sentences, their only choice is to represent themselves.

3. <u>The Appellate Assigned Counsel System</u>

Fewer than twenty percent of assigned appeals in Michigan are handled by a state-funded appellate defender office. The rest go to private practitioners who join a state-administered roster. The Michigan Appellate Assigned Counsel System (MAACS) maintains the roster and oversees trial court compliance with an appointment process that promotes the equitable distribution of cases to qualified counsel. New roster members must attend a two-day orientation program on criminal appellate practice that includes such topics as appellate court rules, issue identification and postconviction trial court

motions. Roster attorneys also receive substantial reference materials geared specifically to Michigan criminal appeals.[2] However the trial courts are responsible for payment. Appellate assigned counsel fees vary widely but are generally low, making it difficult to attract and retain well qualified roster members.[3]

MAACS also attempts to enforce compliance with twenty minimum performance standards approved by the Michigan Supreme Court in 1981. The standards define the steps assigned counsel should take in representing

[2] Michigan Appellate Assigned Counsel System, A Decade of Challenges (Lansing, 1995) pp. 8, 22-25.

[3] Id. at 8, 15-16.

indigent clients on appeal. These include meeting all deadlines, investigating off-record issues and raising all claims of arguable merit.[4]

Because MAACS lacks the staff to routinely review even a sample of all roster attorney assignments, the quality control process is primarily complaint driven. MAACS receives several hundred letters a year from indigent prisoners who believe their cases are being neglected or that their lawyers are failing to raise meritorious claims of error. Some of these complaints are unfounded, but many are not. Over 50 lawyers have been

[4] Id. at Appendix.

removed from the roster or resigned under investigation for such conduct as neglecting dozens of cases, failing to communicate with their clients, repeatedly filing the same "canned" briefs, and failing to raise meritorious issues that had been preserved on the record by trial counsel.[5] When it

[5] Id. at 18. See also, People v Smith, 158 Mich App 220, 405 N.W.2d 156, lv. den. 428 Mich 903 (1987) (reversing murder conviction on second appeal based on issues missed by ineffective prior appointed counsel) and People v Michael Anderson, 442 Mich 882; 500 N.W.2d 478 (1993) (remanding to the Court of Appeals for appointment of new appellate counsel where counsel handling already completed appeal of right was ineffective). Where there is a disagreement between lawyer and client about whether a claim the client wishes to raise has merit, the client can choose to file a pro se supplemental brief. See People v Dukes, 189 Mich App 262; 471 N.W.2d 651 (1991). The minimum performance standards require the lawyer to provide enough clerical assistance to make such a brief acceptable for filing, but the client must research and draft the substance. Prisoners must also reply on the merits, within court-ordered deadlines, when their lawyers seek to withdraw

appears that a lawyer may be providing inadequate representation on a regular basis, MAACS reviews all of that lawyer's pending assigned appeals. Such analysis invariably reveals clients have been harmed who have never complained.[6]

When MAACS removes an attorney from the statewide roster, it attempts to obtain substitute counsel for clients whose cases are still pending.[7] It cannot help former clients whose convictions have already been affirmed by the Court of Appeals. No matter

pursuant to Anders v California, 386 U.S. 738 (1967) because the lawyer can find no meritorious issues to appeal. MCR 7.211(C)(5).

[6] A Decade of Challenges, fn. 2, supra, at 18.

[7] Id. at 19.

how egregious the removed attorney's conduct was, or how meritorious missed issues may have been, once the Court of Appeals has acted the right to appointed counsel no longer exists.

In sum, even prisoners who have appointed counsel for their direct appeals may have to research issues themselves and reduce their arguments to writing. The extent to which those arguments must be framed as precise legal issues, replete with citations to authority, depends on whether the prisoner is responding to an Anders motion, trying to persuade MAACS to investigate unraised claims, or filing a formal supplemental brief. Nonetheless, in

each of these situations the prisoner, who may not even have a copy of the trial court transcript, much less specialized training and reference materials, has to overcome the presumption that the lawyer who has chosen not to raise the issue must be correct.

4. Supreme Court Applications

The scope of assigned appellate counsel's responsibilities in Michigan does not include seeking leave to appeal to the state Supreme Court if the Court of Appeals denies relief. MCR 6.425(F)(1)(d). Until April 1, 1990, MCR 7.303 permitted indigent prisoners to seek Supreme Court review by submitting what became known as "letter

requests". These letters required only the defendant's name and address, the Court of Appeals docket number, and the date of the decision being appealed. So long as the letter was submitted within 56 days of that decision, the Supreme Court would review the entire Court of Appeals file. If it was concerned about the propriety of the Court of Appeals decision, the Supreme Court could direct the appointment of counsel to prepare a full-blown application for leave or order the prosecution to show cause why the conviction should not be reversed.

While letter requests lacked the advantage of advocacy by counsel, they did provide ready access to the Supreme Court.

Anyone who could read and write could help an illiterate prisoner draft a simple letter. Segregated prisoners were not disadvantaged by their inability to use a law library. The opportunity to obtain relief, or at least to exhaust state remedies, was real. However, as the prison population exploded, so did the Court of Appeals docket. Inevitably, the growth in appeals pushed its way into the Supreme Court as well.

The Court responded by rescinding the letter request procedure. Admin. Order 1989-28, entered 1/26/90. It did not expand the scope of assigned appellate counsel's responsibilities to include seeking leave to appeal adverse Court of Appeals decisions.

Now indigent prisoners must prepare leave applications under MCR 7.302, the same rule that governs pleadings prepared by lawyers.

A Supreme Court application must identify each issue the prisoner wants the Court to consider and explain why it meets one of several grounds for Supreme Court review. The Court of Appeals decision must be attached, along with an affidavit of indigency and proof of service. The Court of Appeals brief should be attached as well. Indigent prisoners need file only one copy of the application, instead of eight, and the Court accepts a fill-in-the-blanks style form that helps prisoners structure the information they must provide. However the

56-day filing deadline continues to be strictly enforced.

As Justice Charles Levin explained in his dissent to Keen v Thumb Correctional Facility Warden, 444 Mich 871; 509 N.W.2d 148 (1993), the Supreme Court Clerk is forbidden to accept applications received so much as one day late. The Court has repeatedly refused to consider applications even from prisoners who proved that they were not told of the Court of Appeals decision by their assigned counsel until the 56-day period had expired. Thus, whether the prisoner is uninformed or is simply unable to file an application on time because of illiteracy, segregation status, a sudden transfer or

copying problems, the opportunity to seek Supreme Court review is lost -- and with it goes the ability to exhaust state remedies.

5. Motions for Relief from Judgment

Until 1989, a prisoner who had never had an appeal, or who needed to do a second appeal in order to litigate unraised issues or federalize issues raised only on state grounds, did not face significant procedural constraints. Delayed motions for new trial could be filed in the trial court at any time.

In that year, Michigan adopted Subchapter 6.500 of the Michigan Court Rules to establish a procedure for postappeal

proceedings in criminal cases. The new "Motion for Relief from Judgment" became the exclusive means to challenge a conviction for a defendant who has had an appeal by right or leave, sought leave to appeal and been denied, or has never had an appeal but cannot seek leave because the application period has expired. The applicable rules are patterned after those governing proceedings under 28 U.S.C. § 2255.

The required form of a Motion for Relief is set forth in MCR 6.502. In addition to basic identifying information, the prisoner must provide a detailed procedural history of the case, including all prior attempts to obtain postconviction relief and the name of

each lawyer who represented the defendant at every stage of the case from the time of arrest. The prisoner must describe:

(11) The relief requested;

(12) The grounds for the relief requested;

(13) The facts supporting each ground stated in summary form;

(14) Whether any of the grounds for the relief requested were raised before; if so, at what stage of the case, and, if not, the reasons they were not raised.

When an issue could have been raised on appeal but was not, the prisoner must show both good cause as to why it was not raised previously and actual prejudice from the alleged irregularity. MCR 6.508(D). The

only exception is for jurisdictional defects. The trial court may waive the "good cause" requirement if it believes the prisoner may actually be innocent.

This is not an exercise in simple storytelling. The prisoner must conceptualize the facts as legal issues and provide authority to demonstrate that these issues constitute grounds for relief. Unlike the situation with pro se Supreme Court applications, there is no Court of Appeals brief prepared by counsel on which the prisoner can rely. On the contrary, in a motion for relief from judgment the issues are, by definition, ones that have not been briefed before. And, of course, they must be

conveyed persuasively enough to overcome norms against granting delayed or repeated appeals.

MCR 6.505 permits the trial court to appoint counsel in connection with a motion for relief from judgment, but requires counsel only if the court desires oral argument or an evidentiary hearing. In fact, counsel is appointed rarely. The vast majority of motions for relief are summarily dismissed under MCR 6.504(B)(2).

In addition to the inherent difficulties motions for relief present to prisoners who are segregated or not literate in English, the Michigan Supreme Court recently created two more. First, on June 2, 1995, the Court

amended MCR 6.502 to state emphatically that: "after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction." The only exceptions are for retroactive changes in the law or newly discovered evidence.

As a result of this amendment, prisoners who submit inadequate motions for relief will never have a chance to correct their mistakes. Even if they are subsequently able to obtain competent lay assistance or to retain counsel who discovers clear reversible error, they will have no procedural avenue available for raising previously unraised issues. And, of course, if the unraised issues are of constitutional dimension, the

prisoners will never be able to raise them in federal court either because they will be unable to exhaust their state remedies. Prisoners who lack adequate assistance must effectively choose between not filing motions, for fear of doing a bad job and wasting their only opportunity, or doing the best they can on their own and in fact wasting their only opportunity.

The second new hurdle was erected in People v Reed, 449 Mich 375; 535 N.W.2d 496 (1995). There the Court held that a failure of assigned appellate counsel to raise an issue of arguable merit on the prisoner's appeal of right does not necessarily constitute "good cause" that permits raising

the issue in a motion for relief from judgment. In order to show good cause, the prisoner must demonstrate that failure to raise the issue constituted ineffective assistance of counsel as defined by this Court in Strickland v Washington, 466 U.S. 668 (1984), or that some external factor prevented counsel from raising it. Thus, the prisoner who has already lost the opportunity to have a viable claim of error considered on direct appeal must, in order to have that claim considered in a motion for relief, first litigate the question of whether assigned counsel's failure to raise it resulted from mere error or inadvertence or

rose to the level of constitutionally cognizable incompetence.

A motion for relief from judgment is the only recourse available to prisoners in the following situations:

-- where an indigent prisoner, convicted at a trial, failed to request counsel within 12 months of sentencing and to file a pro se Court of Appeals application for leave within that time;

-- where an indigent prisoner, convicted by plea of guilty or nolo contendere, failed to request counsel within 42 days of sentencing and to file a pro se Court of Appeals application for leave within 12 months;

-- where the direct appeal was by leave (all plea appeals and trial appeals with late counsel requests) and counsel neglected to file an application within 12 months; and

-- where a brief on appeal or application for leave was filed, either by counsel or by a prisoner proceeding in pro per, and meritorious issues were overlooked.

It is impossible to estimate how many hundreds of illiterate, non-English speaking or segregated prisoners presently fall into one of these categories annually. There is no question that if the right to counsel for plea appeals is eliminated altogether, there will be many hundreds more.

B. THE ABILITY OF MICHIGAN PRISONERS TO PERFORM THESE TASKS

Two separate class actions resulted in federal district court findings regarding access to the courts by prisoners at selected

Michigan facilities. In Knop v Johnson, 667 F.Supp. 467 (W.D. Mich. 1987), Judge Richard Enslen concluded that inmates who could not use law libraries for such reasons as illiteracy, and inmates in segregation who were not permitted to use the main law libraries, were denied access. In Hadix v Johnson, 694 F.Supp. 259 (E.D. Mich. 1988), Judge John Feikens reached similar conclusions.

These cases were consolidated on appeal. Knop v Johnson and Hadix v Johnson, 977 F.2d 996 (6th Cir. 1992). The remedies in both were rejected as overly broad and both were remanded to Judge Enslen for "reshaping". However, the Court of Appeals accepted the

factual findings of the district courts, which include the following.

Both indigency and illiteracy are widespread. Twenty percent of prisoners at the State Prison of Southern Michigan's Central Complex "are totally illiterate and cannot read". Fifty percent are functionally illiterate and "unable to comprehend basic, written legal resources offered in the Central Complex library system." The average prisoner can read and comprehend at only a sixth grade level. Common legal materials require reading levels of grade 14 or higher. Hadix, supra at 259, 269, 283

Eighty-two percent of Central Complex prisoners had less than $80 in their prison

accounts to use for buying personal hygiene items, postage, and other necessities. These prisoners could not afford to retain attorneys or to pay other prisoners to help them with legal problems. Hadix, supra at 283.

When it comes to using the prison law libraries, even prisoners in general population are left pretty much on their own. Neither the civilian law librarians nor their inmate clerks are trained or expected to assist any prisoners with legal research or drafting. Hadix, supra at 283-284; Knop, supra at 488, 491.

Prisoners in various segregation units are at an even greater disadvantage because they have no direct access to law libraries.

Segregated prisoners may request three to five books at a time, three to five days per week, from the prison's main law library. If the requested volumes are not in use, the books are delivered and may be kept by the segregated prisoner until they are picked up the next day. This system assumes, of course, that prisoners know precisely which books they need. Hadix, supra at 283; Knop, supra at 489-490, 491.

Segregated prisoners also may use, for two hours a week, a mini-law library located in a segregation unit cell. Judge Enslen characterized these small collections of books as "pathetically inadequate". Knop, supra at 490. Any assistance from other

prisoners is usually unavailable. When the District Court findings were made, about 1,200 of the 2,400 Central Complex prisoners and 344 of 606 prisoners at the Marquette Branch prison were held in segregation. Hadix, supra at 283; Knop, supra at 470.

Assistance from jailhouse lawyers is not a reliable means of providing access to the courts. As Judge Enslen observed: ". . . the often-fabled jailhouse lawyers or writ-writers are, at least in the Michigan system, too few and often too uninformed to provide adequate assistance to the inmates." Knop, supra at 488. Few of the prisoners who call themselves jailhouse lawyers actually possess even rudimentary legal skills, and there is

no procedure for monitoring the quality of their work. Most violate prison rules by charging substantial sums for their services. They are not permitted extra law library time to work on other prisoners' cases, and they are not permitted to possess their "clients'" legal papers without obtaining a DOC legal assistance agreement form, a document that is in fact rarely available. Legal papers are exchanged nevertheless and may be separated permanently from their owners when either the jailhouse lawyer or the client is transferred. Hadix, supra at 284; Knop, supra at 488-489, 490, 491.

The only other assistance available to indigent prisoners in situations where there

is no right to appointed counsel is Prison Legal Services of Michigan (PLSM). A private non-profit corporation that was started with American Bar Association grants in the 1970's, PLSM began receiving Department of Corrections funding in 1978. It is authorized to provide services only to prisoners at the State Prison of Southern Michigan which, over the course of a year, houses 10,000 different prisoners. It was contractually prohibited from assisting prisoners in civil rights actions against the DOC. Its staff consists of fewer than two full-time attorneys and three or four prisoner paralegals. In 1982, Judge Feikens issued an injunction that continued funding

of $118,700 per year. Knop, supra at 486; Hadix, supra at 261, 273, 285.

There was substantial testimony in Knop from prisoners who were unable to get to law libraries, or to find the books they needed in time to prepare pleadings and answers, or to understand the contents of the books if they found them. Id at 492. In concluding that prisoners in such circumstances were being denied meaningful access to the courts, Judge Enslen observed:

> "As a district court judge who has reviewed and decided numerous prisoner complaints and petitions, I know that many inmates do not respond to Reports and Recommendations and court orders. Because of the evidence I considered in this case, I have a deeper appreciation of the difficulties inmates face in filing a meaningful complaint and in

defending the validity of that complaint." Knop, supra at 495.

Since the district court testimony was taken eight or more years ago, some things have changed. There is no reason to believe that Michigan prisoners are any less indigent or any more literate, but there are many, many more of them. In 1986, Michigan had 13 prisons and a camp program with a total of 18,836 prisoners. By December, 1994, there were 40 prisons and 16 camps housing 38,145 prisoners.[8] The DOC operating budget alone has grown from $500 million in 1986 to $1.3

[8] Michigan Department of Corrections, 1994 Statistical Report (Lansing, 1995), pp. 71-77.

billion in 1995. PLSM's size and funding remain the same.

Of the current prisoner population, 3,342 are confined in segregation units that do not permit direct physical access to law libraries. An unknown but rapidly increasing number do not speak much English. Because of changes in Michigan's juvenile waiver laws, annual commitments now include nearly two hundred new prisoners who were aged 15 or 16 when their crimes were committed.[9]

[9] Michigan Department of Corrections, Office of Planning, Research and Management Information Services, Data Points (Lansing, Summer 1995) p. 2.

C. THE JUDICIAL ROLE IN PROTECTING ACCESS

Providing prisoners with the means to access the courts effectively is not a question of what can be done, but of who should decide what must be done. Access to courts an area where deference to prison officials is not required for three reasons.

First, it is not an area where they have expertise. It is judges, not wardens, who understand the mechanics of legal research, the significance of missed deadlines, the complexity of state exhaustion requirements, the intellectual difficulty of translating particular facts into recognizable legal theories, and the exceptional showing the pro

per petitioner must make to have counsel appointed. While courts can take testimony to assess the reasonableness of time, place and manner restrictions imposed in the name of prison security, corrections officials have no basis for deciding how much legal assistance is enough.

Second, this is an area in which the role and authority of the courts are at issue. It is courts that have the constitutional responsibility to insure that their doors are open to all citizens and, in particular, to protect the rights of individuals against misuse of power (whether deliberate or inadvertent) by the state. To the extent that mistakes have been made by

lower courts, it is the judiciary's job to correct them. The fact that a right to appointed counsel only exists for the first direct appeal does not suggest that other means of enabling prisoners to seek judicial review are unimportant. On the contrary, absent a right to counsel, other means become even more important. Courts may need to protect their own dockets against the frivolous or repetitive claims of some overly litigious prisoners, but they can apply their own rules and sanctions for this purpose. Certainly courts should not control their dockets by delegating to prison administrators the effective authority to deny court access to large groups of prisoners on

grounds no more related to merit than the would-be petitioner's literacy in English.

To the extent that prisoner claims concern prison conditions, the third reason for withholding excessive deference becomes apparent. Corrections officials have obvious self-interest in avoiding suit. Indeed, the more substantial a potential civil rights claim might be, the more incentive a corrections department has to protect itself from judicial scrutiny.[10] It is dangerously circu-

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[10] While state officials issue press releases about frivolous prisoner complaints, this Court can take judicial notice of the fact that current efforts to "get tough" on prisoners are likely to result in an increasing number of serious civil rights violations. See, for instance, the recent front-page article in the National Law Journal which described how a prisoner on an Alabama chain gang was chained to a pole with his arms over his head for ten hours after having an epileptic seizure.

lar for courts to abdicate to the state responsibility for deciding which prisoners will be given the means to seek judicial redress from an exercise of state power on

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Morrison, "The New Chain Gang", Nat'l. L.J., Aug. 21, 1995, p.A1.

In Michigan, the Department of Corrections recently took steps to revise drastically prisoner visitation rules that have been effective for decades. Among many controversial provisions are a ban on visits by siblings younger than 18 and a grant of total discretion to wardens to deny placement of any visitor on a prisoner's approved list. When a legislative oversight committee, which is required by state law to review proposed administrative rules, refused to approve these rules as drafted, the governor declared the state law unconstitutional and ordered the rules adopted. These events have led to litigation in state court regarding the constitutionality of Michigan's legislative veto [Blank v Michigan Department of Corrections, Jackson Circuit Nos 95-73300, 95-72477 (opin. issued 9/14/95), appeal pending (Mich. Ct. Of App. No. 188881)] and in federal court regarding the constitutionality of the visitation rules themselves [Bazetta v McGinnis, 95-CV-73540-DT (E.D. Mich. S.D., filed 8/22/95)].

the ground that exercising power is a tough job with which judges should not interfere.

Defining the adequacy of law libraries and of legal assistance for those unable to use libraries is not fundamentally a question of how to run a prison, but how to get a claim before a judge. The Turner test of reasonableness should apply only to prison regulations initiated for penological reasons that incidentally burden constitutional rights, such as limiting correspondence between prisoners (Turner) or restricting specific publications that might affect institutional security (Thornburgh v Abbott, 490 U.S. 401 (1989)).

Where the question is the scope of the state's affirmative duty to facilitate access to the judiciary -- the one constitutional right on which all others depend -- it is not the courts that are interfering with corrections departments. It is the other way around. Courts, too, must demand proper deference to their difficult and historic role. If prison officials, either directly or indirectly, are permitted to determine which prisoners get to the courthouse door, they will have effectively negated the ultimate judicial function in a government of checks and balances -- the power to review the legality of confinement.

CONCLUSION

Whether indigent prisoners have meaningful access to the courts depends on a complex interaction of factors in each state. The extent to which prisoners are unable to help themselves, because they cannot read and write English adequately or are denied physical access to libraries, is one factor. The extent to which prison officials help prisoners overcome these handicaps is another. A third factor is the quality and scope of the jurisdiction's system for providing appointed counsel for direct appeals and other forms of postconviction review. Where the right to counsel is narrow, or the

appointment process frequently fails to insure effective representation, prisoners are forced to depend more on their own resources to obtain judicial review of errors affecting their convictions or sentences. Finally, there is the manner in which courts themselves set the terms of access. Detailed pleading requirements, complex rules of practice and strictly enforced filing deadlines all make the task of representing oneself from a prison cell that much more difficult.

Faced with an access claim, a federal district court cannot only take testimony on all these factors. It can assess that testimony in light of its own familiarity with state practices and personnel. District

judges who gain experience over time with state appellate court rules, the responsiveness of corrections officials to civil rights violations generally, and even the membership of the local bar are in the best position to weigh these factors and measure the mix. And they can fashion remedies that are realistic, appropriate and workable.

Amicus recognizes that these remedies should not burden state prison officials unnecessarily. But inconvenience and cost must be weighed against the prisoner's right to seek judicial review of both the legality of his or her confinement and the constitutionality of the conditions of that confinement. State court dockets are badly over-

burdened; underfunded indigent defense systems are strained past their limits. Mistakes in individual cases are inevitable. Add to this the current trend of getting tough on crime by making prisons as "unpleasant" as possible, and it is apparent that the right of access to the courts is becoming ever more critical to ever more prisoners. Amicus Prison Legal Services of Michigan urges this Court to reinforce the flexibility of lower federal courts to fashion appropriate remedies that account realistically for all the factors that affect the ability of illiterate, non-English speaking and segregated prisoners even to knock on the courthouse door.

For the foregoing reasons, amicus respectfully urges the Court to uphold the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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